UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

YP MIDWEST PUBLISHING, LLC d/b/a DEXYP,

Respondent,

and **07-CA-218455**

DISTRICT 4, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO,

Charging Party.

RESPONDENT YP MIDWEST PUBLISHING, LLC d/b/a DEXYP'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S ANSWERING BRIEF

YP Midwest Publishing, LLC d/b/a DexYP ("DexYP", "Respondent" or the "Company"), by its attorneys, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., hereby submits its Answering Brief in response to Charging Party's Exceptions to the ALJ's Decision and Order of Administrative Law Judge Melissa M. Olivero dated June 18, 2020.[1]

I. INTRODUCTION AND STATEMENT OF THE CASE

YP Holdings, LLC and affiliated entities with employees represented by various Locals of District 4 of the Communications Workers of America ("CP" or "CWA") was acquired by Dex Media Holdings, Inc. on June 30, 2017. ALJD 3.17-19; Tr. 18, 56, 82; ALJD 4.12-22; GC Exs. 1(x) and 1(bb); Tr. 18, 24, 132-134. Subsequently, Dex Media Holdings and YP Midwest Publishing became known as DexYP. ALJD 3.18-20; Tr. 56, 82. Following the acquisition, Respondent assured District 4 that all of its collective bargaining agreements remained in place and that its obligation to bargain with the CWA remained unchanged. ALJD 3.42-44; GC Ex. 3.

In 2015 and prior to the acquisition by Dex Holdings, YP Holdings maintained a defined contribution 401(k) Retirement Savings Plan that provided for an 80% match on an employee's contribution of between 0% and 6%, with a maximum match of 4.02% for covered bargaining unit employees. ALJD 4.26-5.9; R. Ex. 3, pp. 1, 24 and 27. In 2016 and prior to the acquisition, YP Holdings created a new defined contribution 401(k) program with an 80% match on an employee's contribution of up to 6%, with a maximum contribution of 4.8% for covered bargaining unit employees. ALJD 5.11-45; R. Ex. 4, pp. 9 and 12. YP Holdings never provided covered bargaining unit employees a 5% match to employee contributions and, post-acquisition, Respondent never provided covered bargaining unit employees a 5% match to employee 401(k)

[1]Respondent states that any exception that does not comport with the filing requirements of Section 102.46(a)(1) should be disregarded under Section 102.46(a)(ii).

contributions. ALJD 6.1-5; Tr. 63. The highest match paid to covered bargaining unit employees was 4.8%. ALJD 6.5-7; R. Ex. 5.

Prior to the acquisition and beginning in June of 2016, YP Holdings and CP engaged in negotiations of a collective bargaining agreement. ALJD 6.21-22; R. Ex. 6, 8; Tr. 83, 88. During negotiations, CP proposed increasing the 401k match to 6% of the covered bargaining unit employee's contributions and the proposal was specifically rejected. ALJD 6.22-23; R. Ex. 1; Tr. 89, 165. CP then proposed increasing the 401(k) match to 5% of the covered bargaining unit employees' contributions and the proposal was specifically rejected. ALJD 6.24-26; R. Ex. 6, 8; Tr. 92, 93, 165 and 167. YP Holdings never agreed to a 5% match at the bargaining table. ALJD 6.27; Tr. 175, 177.

According to the CP, during a negotiation sidebar conversation in or around September of 2016, YP Holdings and CWA agreed to a "deal" as long as the collective bargaining agreement guaranteed there would be a 401(k). ALJD 29-33; Tr. 139-140. Prior to the 2016 collective bargaining agreement, there was no reference to the 401(k) in the collective bargaining agreement. Tr. 93, 112, 128, and 137. On September 16, 2016, YP Holdings and CWA signed a Memorandum of Agreement ("MOA") memorializing the negotiations and agreements reached during bargaining, include the following provisions:

> . . . the parties have met and engaged in good faith bargaining for the purpose of arriving at a successor collective bargaining agreement to the agreement that expired on August 13, 2016. The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein.
>
> . . .
>
> The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement.

ALJD 6.38-7.17; R. Ex. 2, pp. 1 and 20; Tr. 93-94. The MOA was executed at the conclusion of negotiations in September of 2016. Tr. 164.

In the words of CP's chief negotiator Terri Pluta:

> Q. [Zwisler] And then at the conclusion of the bargaining, which was roughly in September of 2016, the parties entered into the signed memorandum of agreement which is reflected in R-2, correct?
> A. [Pluta] Correct.
> Q. And you agree that this reflects the understanding that was reached at the table?
> A. This is what we agreed to.

Tr. 164:13-20, Tr. 135. The terms of the MOA went into effect following ratification of the bargaining unit and YP Holdings' Board of Directors, with an effective date of August 14, 2016 through August 10, 2019. ALJD 7.19-28; GC Ex. 2; R. Ex. 2.

Approximately six months after the conclusion of negotiations and eight months after the effective date of the CBA, Pluta emailed Brian Herman regarding the status of the drafted CBA.[2] ALJD 7.30-32; GC Ex. 8. Herman sent to Pluta a redlined version of the agreement. ALJD 7.34-35; GC Exs. 7-8. Pluta returned to Herman her own version of the CBA, notably without redlining. ALJD 7.37-38; GC Ex. 2; Tr. 107. The final version of the CBA included language that read:

> The benefits set forth in the YP Midwest Publishing LLC Benefits Outline Summary ("Benefits Summary") shall remain in effect for bargaining unit employees through December 31, 2016.
>
> . . .
>
> The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee contributed to individual 10 accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for nonrepresented, non-bargained [sic] employees, the % shall also be increased for bargained employees.

ALJD 7.38-8.15; GC Ex. 2 (p. 133), 10-11.

[2] Herman was a labor attorney employed by YP at the time of negotiations who was no longer employed by DexYP. Tr. 102.

In October of 2017, Shannon Kirkland became aware of what he believed to be a change in the 401(k) program.[3] ALJD 8.22-23; Tr. 28. Following a request for information, Steve Flagler[4] sent to Kirkland a "Benefit Grid for 2018" that included reference to a 4.8% match in the 401(k) for covered bargaining unit employee contributions. ALJD 8.28-39; GC Ex. 4; R. Ex. 9; Tr. 32. The Summary Plan Description for the plan effective January 1, 2018, included reference to a 4.8% match in the 401(k) for covered bargaining unit employee contributions. ALJD 8.41-9.9; GC Ex. 5 (p. 15); GC Ex. 6 (p. 5); Tr. 59, 73, 75-76.

The relevant charge was filed on April 13, 2018, alleging violations of Sections 8(a)(5) and 8(d) of the National Labor Relations Act (the "Act"). ALJD 9.13-41; GC Ex. 1(v). In contrast, the operative portions of the Complaint allege a unilateral change and only violations of Sections (8)(a)(1) and (5) of the Act. ALJD 10.1-24; ALJD 2.21-22; GC Ex. 1(x). A hearing was held on April 23, 2019 before Administrative Law Judge Melissa M. Olivero with a decision issued on June 18, 2020 (the "Decision"). ALJD 1. Based upon her assessment of the facts, credibility of the witnesses, and the applicable legal principles, ALJ Olivero dismissed the Complaint in its entirety. *Id.*

II. ISSUES PRESENTED BY CHARGING PARTY

Charging Party filed 10 Exceptions to the ALJ's decision. According to the Charging Party, the exceptions present the following issues:

A. Whether the ALJ erred by considering and relying upon parol evidence (Exception 1).

[3] Kirkland is a Staff Representative of the CWA and was present for a portion of the negotiations that led to the then current agreement. Tr. 23-25.

[4] Flagler was a part of the YP negotiations team and remained employed by DexYP following the acquisition. Tr. 33, 88. Flagler left DexYP in December of 2018. Tr. 88.

B. Whether the ALJ erred in concluding that the Respondent failed to continue in effect all terms and conditions of the collective bargaining agreement (GC2) by unilaterally changing its 401(k) contribution formula in violation of Sections 8(a)(5) and (1) of the Act (Exceptions 2-9).

C. Whether the ALJ erred in concluding that the Respondent failed to continue in effect all terms and conditions of the collective bargaining agreement (GC2), by unilaterally changing its 401(k) contribution formula in violation of Section 8(d) (Exceptions 2-8, 10).

III. APPLICABLE LAW AND ARGUMENT

Sections 8(a)(5) **a**nd 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. *See id.* at 747; *Northwest Graphics, Inc*., 342 NLRB 1288 (2004).

An employer may defend against an assertion of a modification to an existing collective bargaining agreement and an allegation of a unilateral change by establishing the term in the contract did not reflect the agreement reached during negotiations of the referenced term, a lack of change, and a waiver of a right to bargain over the term at issue. In this case, CP's and the General Counsel's sole justification for its position is language that erroneously found its way into the collective bargaining agreement, despite undisputed evidence that the term referenced in the CBA was specifically rejected during negotiations, the Parties signed a contemporaneous memorandum of agreement that expressed the Party's intent and agreement, and the referenced term was **never** a term of employment applied to the applicable bargaining unit.

Charging Party's circular argument that — the challenged language was in the agreement and, therefore, the challenged language must be enforced — is not consistent with the NLRB's underlying directives nor the governing case law. The Decision should be affirmed and the Charge dismissed.

IV. RESPONSE TO ISSUES PRESENTED

A. The ALJ correctly considered and relied upon parol evidence (Exception 1).

The central issue in this case is whether the Parties ever mutually agreed to the inclusion of a 5% match to the 401(k), despite the language that found its way into the CBA. "One of the cornerstone principles of the NLRA in relation to collective bargaining is that the Board is to act as a neutral overseer of the bargaining process, without dictating the terms that should be agreed to by the parties." *Total Security Mgmt., Inc.*, 364 NLRB No. 106, at *44 (2016) (Miscimmara, concurring in part and dissenting in part). Put differently, the Board's role in this process is to neutrally and dispassionately protect the bargaining process, which necessarily requires protecting and honoring the intent of the parties:

> A collective bargaining agreement is not an ordinary contract. Moreover, collective agreements are often loosely drawn and less complete than other types of contracts. Much more must be supplied from the context in which they were negotiated to properly interpret them than is true of other contracts. . . . The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the party's own interpretations. A new technical rule of evidence which would render incompetent parol evidence of a party's intent would seem peculiarly inappropriate in the area of collective bargaining.

Mine Workers v. Eastover Mining Co., 603 F. Supp. 1038, 1043 (W.D. Va. 1985) (internal citations and quotations omitted). The ALJ correctly determined the "evidence conclusively established that a 5% match was never agreed to during bargaining." ALJD 13.14-15; R. Ex. 2; Tr. 129, 167-169.

Based upon that finding, the consideration of parol evidence was not only appropriate, but required. The parol evidence doctrine does not operate to exclude evidence offered to establish no agreement was actually reached. ALJD 13.25-26 citing *Apache Power Co.*, 223 NLRB 191, 194 (1976). *Apache Power* is controlling precedent and on all fours with the facts presented to the ALJ. Where the judge concludes the parties did not reach agreement on a topic that was included in a contract, it was not an unfair labor practice to fail to execute on that provision. *Id.* at 195. Similarly, and consistent with the facts presented in this case, there was indisputable evidence that the parties did **not** agree to a 5% match during the course of negotiations. In fact, the 5% match was expressly rejected during negotiations and consideration of parol evidence to determine whether an agreement was reached was appropriate. The inclusion of a 5% match in the final CBA was palpably at odds with the agreements reached during negotiations and any further changes were specifically precluded by the signed MOA. R. Ex. 2. "The Union and Employer collectively have reached agreement and the predecessor agreement shall **only** be revised as specifically set forth herein." ALJD 7.3-5; R. Ex. 2 (emphasis added); Tr. 164.[5] *See also Local 32B-32J, Service Emps.*, 258 NLRB 430 (1981). In *Local 32B*, the ALJ's determination was adopted by the Board inclusive of the ALJ's determination that "the Board has held that the 'parol evidence rule does not operate to exclude testimony offered to establish that in fact no agreement was reached in the first place." *Id.* at 433. Where a term is "palpably at odds" with a prior agreement, there can be no finding of a meeting of the minds related to that provision. *Id.* The evidence was uncontroverted that, during bargaining, the Company rejected CWA's demand of a 5% 401(k) match and CWA was aware of the

[5] The evidence expressly rebuts the assertions brought forward in Charging Party's Exception 7.

Company's position.[6] Further, and as testified to by the CWA's chief negotiator, the signed MOA (R. Ex. 2) reflected the agreement the parties reached during negotiations. Tr. 164. There was no meeting of the minds for referenced provision in the CBA, which is palpably at odds with the agreement reached during negotiations.

Windward Teachers Association, as cited by CP, is not dispositive. 346 NLRB 1148 (2006). Initially, it must be noted, this is not a refusal to sign case. Both parties executed the CBA (GC Ex. 2), and lived with Respondent's 4.8% 401(k) match for approximately 19 months.[7] In *Windward*, the parties agreed on a specific terms—a $2,000 bonus—during negotiations and the Board determined there was a meeting of the minds. In contrast, the "meeting of the minds" achieved during negotiations was that Respondent would not guarantee a 5% match to the 401(k). R. Ex. 2; Tr. 129, 164, 166 - 167. It was undisputed that, during the terms of negotiations, the only agreement reached during negotiations was that the CBA would reflect the existence of the 401(k). The "mistake" referenced in *Windward* is wholly distinct from the mistake in the present case. In *Windward*, the mistake related to the whether the language reflected the agreement reached during negotiations. In contrast, the "mistake" before the Board relates to an undisputed rejection of the CWA's proposal during negotiations and language that is expressly contrary to the agreement reached during negotiations, which is a mistake that is so obvious as to put the parties on notice.

Kal Kan Foods is equally unavailing for the Charging Party. 288 NLRB 590 (1988). In *Kal Kan*, the ALJ rejected an effort to orally modify a fully integrated contract with parol

[6] *See also Aei2, LLC*, 343 NLRB 433, 435 (2004) in which the Board rejected an argument of the respondent which attempted to include a side letter into a CBA when the evidence was clear that the union had rejected a proposal that the side letter be included in the CBA. Similarly, the evidence in this case established a 5% 401(k) match was specifically rejected during negotiations and should not be imposed on Respondent.

[7] Charging Party wholly fails to explain how a term that was effective in August of 2016 (the 4.8% match) was somehow renegotiated and modified some eight months following the conclusion of negotiations without any requested or actual retroactive application.

evidence. In this case, as determined by ALJ Olivero, the Memorandum of Agreement signed by both parties at the conclusion of negotiations was an integrated agreement with terms that specifically provided, "The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein." ALJD 15.20-25; R. Ex. 2. In contrast to *Kal Kan*, this integrated agreement specifically limited further modifications and the case is distinguishable.

In *B.F. Goodrich Chemical*, 232 NLRB 399 (1977), the parties negotiated over a 20% payment clause and a post-negotiation dispute arose over whether the 20% payment was with or without specific qualifications. The union contended the 20% payment was without qualifications and the respondent asserted the agreement reached during negotiations was limited to "broad terms" which included qualifications. *Id.* Finding a mutual misunderstanding concerning the 20% payment language, the Board adopted the ALJ's recommendation of dismissal. *Id.* Similar to the court in *B.F. Goodrich*, ALJ Olivero properly considered all of the evidence to determine whether an agreement had been reached and, based upon all of the evidence in the record, correctly determined the parties never agreed to a specific match for the employee 401(k) contributions. ALJD 13.29-31; 14.17-18.[8]

Charging Party posits this was a case of unilateral mistake for which the Company should be held responsible. The evidence does not support such a position and, regardless, as found by Judge Olivero and stated by the judge in *Apache Power*, "Whether this situation is viewed, as contended by the General Counsel, as one of unilateral mistake, or as contended by Respondent, as one of mutual mistake, there was in my view no agreement." ALJD, 14, fn 9. Where there

[8] *See also Arbah Hotel Corp*. 368 NLRB No. 119, at *32 (2019) ("In any event, parol evidence is admissible in order to establish the existence of a past practice inconsistent with the terms of the expired contract.") (internal citations omitted). *See also Pioneer Elec. Contractors, Inc.*, 32 NLRB AMR 10, 2004 WL 6016832 (2004) ("When parties reach an agreement but, because of a mutual mistake, they fail to reduce what was agreed upon to writing, the appropriate remedy is to reform the written agreement to the agreed upon terms." (citing *Norris Indus.*, 231 NLRB 50 (1977)) (reciting at length the equitable remedy of reformation of written instruments).

was no agreement, consideration of all of the evidence—including the parol evidence—was appropriate and "rescission was the proper remedy for such an obvious mistake." ALJD 14.7-8.

The Board's directive is to preserve and protect the intent of the parties in reaching agreement and obstruct the patent gamesmanship displayed by CP here. In *Norris Industries*, a seminal case on mutual mistake, the Board explained as follows:

> The equitable remedy of reformation of written instruments is the remedy afforded ... to the parties ... to written instruments which import a legal obligation, to reform or rectify such instruments whenever they fail, through mistake or fraud, or a combination of fraud and mistake, to express the real agreement or intention of the parties. The action for such relief rests on the theory that the parties came to an understanding, but in reducing it to writing, *through mutual mistake or mistake and fraud*, some provision or language was omitted, *inserted*, or incorrectly worded, and the action is to change the instrument so as to conform it to the contract agreed on. Reformation of a written instrument is permitted only on the supposition that it does not represent the true agreement of the parties, and is ordered so as to effectuate their true intent. If the instrument embodies the actual contract of the parties, reformation will be refused.
>
> Mutual mistake in a written instrument presupposes a prior or preceding agreement between the parties, and to show the mutual mistake, the preceding agreement must *ex necessitate* be shown. Both parties must have understood the contract as it ought to have been and in fact was, except for the mistake . . . . .
>
> A mutual mistake, for which an instrument will be reformed, is one which is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. It is a mistake shared by both parties to the instrument at the time of reducing their agreement to writing, and the mistake is mutual if the contract has been written in terms which violate the understanding of both parties - that is, if it appears that both have done what neither intended .... By the statement that the mistake must be mutual is not meant that both parties must agree at the hearing that the mistake was in fact made, but that the evidence of ... mutuality must relate to the time of the execution of the instrument and show that the parties then intended to say one thing and by mistake expressed another and different thing . . . .

231 NLRB 50, 64 (1977) (emphasis added).

Here, the record is clear that—although the CWA certainly wanted a 5% employer match—it was unable to secure agreement on that term during bargaining and the signed MOA precluded any changes in the CBA inconsistent with the language of the MOA. R. Ex. 2.

Therefore, the instant language in the collective bargaining agreement is the product of mutual mistake.

The ALJ appropriately found Pluta not credible, finding she gave contradictory testimony and repeatedly equivocated. ALJD 11.1- 12.13. Disregarding the equivocation and misdirection shown by CP's witnesses with respect to their post-hoc "expectations," an examination of the actual bargaining history displays that neither party could have reasonably believed that the agreement reached at the table included a 5% employer match. In contrast to her credibility finding of Pluta, the ALJ found Flagler (Respondent's witness) credible for his candid response to difficult questions on cross-examination, which was supported by other evidence. ALJD 12.25-31; Tr. 95; R. Ex. 2; R. Ex. 6.

Historically, the Company made an effective 4.8% match to employee 401(k) accounts. R. Ex. 4. This much is undisputed. It is also undisputed that the CWA proposed a 6% employer match during bargaining, and that the Company rejected that proposal. R. Exs. 1, 6, 8; Tr. 92-93, 129, and 165. In response, the CWA proposed a 5% employer match. However, the Company indisputably rejected that proposal. *Id.* Unable to secure an agreement on specific contribution rates at the table, the CWA instead settled for contract language generally guaranteeing the 401(k). Tr. 140:11-23. Therefore, the only agreement between the parties was to guarantee the 401(k), without any reference to contribution rates. Indeed, as described by the CP's witness Pluta:

> Keith and I talked about that, we got very, very close, and it came down to that very last thing of we'll have a deal as long as you insert – as long as you have language in the contract that guarantees the 401(k). He did agree to do that and it was – but did not want to draft the language right then and there.

Id. Just as remarkable, Pluta acknowledges that she "**did not get language across the table that said 5 percent.**" Tr. 175:17-18 (emphasis added).

Reflecting this agreement, the initial MOA executed between the parties on September 16, 2016 does not contain a 5% contribution rate, but instead a broad guarantee of the 401(k). R. Ex. 2 (stating that "The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union employees in the drafting of the collective bargaining agreement.").[9] The particular circumstances by which contrary language migrated into the subsequent collective bargaining agreement (GC Ex. 2), are largely immaterial.[10] Indeed, the Parties have divergent views about who drafted which language, and under what circumstances. Tr. 104. What matters, then, is whether the final language (*i.e.*, the terms of GC-2) aligns with the intent of the parties at the time agreement was reached at the table.[11] *See e.g., Pioneer Elec. Contractors, Inc., supra.* Clearly, it does not. "When an agreement is drafted after ratification, courts have held that the agreement reached at the bargaining table controls, notwithstanding execution of documents that vary from the negotiated agreement. *NLRB v. E-Systems, Inc.*, 103 F.3d 435 (5th Cir. 1997), denying enforcement of 318 NLRB 1009 (1995). ALJD 14.33-37.[12]

Therefore, ALJ Olivero correctly considered and relied upon parol evidence reaching the proper conclusion that Respondent did not violate Section 8(a)(5) of the Act. "Thus . . ., this case involves a mistake, made by the parties after the initial version of the MOA was both signed

[9] Contrary to Charging Party's Exceptions 2-6, the original MOA reflected the terms agreed to be the parties during negotiations. R. Ex. 2; Tr. 164. *See NLRB v. E-Systems, Inc*., 103 F.3d 435 (5th Cir. 1997), denying enforcement of 318 NLRB 1009 (1995), *infra*.

[10] The credible Company witness (Flagler) specifically testified that he did not know who inserted the language but he did know that it should not have been included in the CBA. Tr. 111.

[11] There is no rational basis for asserting (or believing) that, after the Company specifically rejected the Union's proposal and the Union acceded the Company's position, that the Company would change its position and propose language inconsistent with the agreement reached during negotiations and include language that was specifically and unequivocally rejected. Further, the Company testified that it was not certain how the language ended up in the CBA but they knew it was not an agreement reached during negotiations. Tr. 111; R. Ex. 2; R. Ex. 6. In this case, the ALJ clearly rejected the concept that the parties agreed to the inclusion of a 5% 401(k) match. ALJD 14.15-18.

[12] Where there is a mistake in the drafting of the language, the Board will not hold either side to the terms of a scrivener's error. *See Chicago Parking Ass'n*, 360 NLRB 1191 (2014) (adopting the Order of administrative law judge in which the judge reformation of the collective bargaining agreement to correct a scrivener's error); *Vermont Tel. Co.*, 348 NLRB 1278 (2006) (adopting the administrative law judge's Order finding the union did not violate the NLRA by refusing to sign a collective bargaining agreement that did not reflect the tentatively agreed to terms).

and ratified, by the inclusion of language in the final version of the MOA that directly contradicted the agreement reached by the parties." ALJD 16.25-28. A finding to the contrary would eviscerate the Board's role as a neutral intermediary of the bargaining process because, in essence, it would require the Board to disregard the actual bargaining process and the undisputed practice that followed thereafter in favor of blind adherence to a contract provision CP did not obtain during bargaining. The Board should not upend decades of mutual mistake precedent, but instead recognize that the Parties made a mutual mistake, and although that mistake surely inures to the benefit of the CP, it does not reflect the Parties' agreement or the established terms of employment.

B. The ALJ correctly concluded the Memorandum of Agreement (R. Ex. 2) was an Integrated Agreement (Exceptions 1-10).

An agreement is "integrated" if it constitutes "a final expression of one or more terms of one or more terms of the agreement." *Kal Kan Foods*, 288 NLRB at 593 (citing Restatement of Contracts 2d). No particular form is required to establish integration. *Id.*

CWA attempted to obtain concessions from Respondent during the course of negotiations, including a guaranteed matching contribution. CWA was unable to secure those concessions during the course of bargaining. Without reaching agreement on specific contribution rates, Charging Party specified that "as long as you have language in the contract that guarantees the 401(k)," "we'll have a deal." Tr. 140. CP concedes that they "did not get language across the table that [specified a] 5 percent [employer match]." Tr. 175:17-18. Rather, the Parties agreed, and **only** agreed, "The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement." ALJD 6.38-7.17; GC Ex. 2; R. Ex. 2, pp. 1 and 20. Anything more than an acknowledgement of the benefit of a 401(k) would have violated the Parties integration clause;

"The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein." ALJD 6.38-7.17; R. Ex. 2, pp. 1 and 20; Tr. 164.

The MOA specifically limited any further modifications to the CBA. R. Ex. 2. The MOA provision related to the 401(k) was a complete embodiment of the Agreement reached during negotiations and the MOA prohibited further modifications thereafter. *Id.* The MOA was fully integrated for this issue. Any provision that expanded or contracted the 401(k) was contrary to the Parties' agreement.

The ALJ correctly found,

> In this case, the language contained in the physically signed version of the MOA makes clear it was an integrated agreement. The version of the MOA signed after negotiations by the parties specifically states, '. . . the parties have met and engaged in good-faith bargaining for the purpose of arriving at a successor collective-bargaining agreement to the agreement that expired on August 13, 2016. The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein.'

ALJD 15.18-25. Therefore, the referenced guaranteed match and potential increase could not have been legitimately included in the final version of the CBA; any such inclusion violated the specific terms of the MOA.

C. The ALJ Correctly Concluded Respondent Did Not Deviate from Its Past Practice and the Terms of Agreement Negotiated During Bargaining (Exceptions 1 – 10).

"An allegation that an employer has violated Section 8(a)(5) by unilaterally changing a term or condition of employment may be defended against on several grounds. The employer may deny that it *changed* a term or condition of employment at all. It may acknowledge that it made a change but deny that it acted *unilaterally*, or that the change involved a *mandatory subject of bargaining*, or that it was *material, substantial, and significant*." *MV Transportation*, 368 NLRB No. 66, at *11 (2019) (emphasis in original).

1. Respondent did not unilaterally change a term or condition of employment.

In order to establish a unilateral change, Charging Party and General Counsel establish what the terms and conditions of employment were before the alleged change, and then establish what the terms and conditions of employment were after the change, and then compare the two. *Golden Stevedoring Co.*, 335 NLRB 410, 435 (2001). A unilateral change is measured by the extent to which it departs from the existing terms and conditions affecting employees. *Crittenton Hosp.*, 342 NLRB 686 (2004); *S. Cal. Edison Co.*, 284 NLRB 1205 fn. 1 (1987); *Mondelēz Global, LLC*, 369 NLRB No. 46, 817 (2020).

Consistent with the evidence, the ALJ determined there was no unilateral change. "Yes. It [the 401(k) match] has always been 4.8 percent." Tr. 99.25; ALJD 17.23-24; ALJD 17.32-42; *see also* Tr. 57, 59, 73, 96, 99, R. Ex. 3 (pp. 24 and 26). The undisputed evidence established neither Respondent nor the predecessor employer paid a 5% match on the bargaining unit employees' 401(k) contribution. R. Ex. 5; Tr. 60, 63, 94, 96, 129, 165. The evidence established the Company maintained a 4.8% match throughout the challenged term. *Id.*

To establish a unilateral change, Charging Party and General Counsel must establish there was an employment practice concerning a mandatory subject of bargaining and "that the employer has made a significant change thereto without bargaining." *Mondelēz Global, LLC*, 369 NLRB No. 46, at *5 (2020). Charging Party and General Counsel failed to establish there was a change to an established employment practice. "Without proof of such an established practice, the General Counsel, has failed to establish a unilateral change." *Id.* at *6. Simply, there was not a change to the amount of match (4.8%) the Respondent and the predecessor organization provided. Therefore, the ALJ did not err in reaching her conclusion that Respondent did not change a term or condition of employment.

2. The Company did not modify a term of employment reached during negotiations.

Charging Party presents a straw man argument by asserting the Company must have violated the Act because it did not comply with a provision in the collective bargaining agreement. However, this argument falls apart when, as here, the ALJ determined the language in the collective bargaining agreement did not reflect the terms negotiated between the parties. The only term agreed to between the Parties was that the collective bargaining agreement would reflect the existence of the 401(k). R. Ex. 2; Tr. 164 and 175. Respondent's post-ratification conduct did not negate or change a term of employment. At no time did the Respondent repudiate the existence of the 401(k)'s application to the bargaining unit employees.

Charging Party concedes that the Company only provided a 4.8% match. CP Br. P. 14-15. Charging Party goes on to argue that a term that was NEVER agreed to and was NEVER actually applied should have been binding because of the erroneous inclusion of the match in the CBA. As found by the ALJ, the 401(k) match was not properly included in the CBA and, therefore, the Company was not bound to blind adherence.

3. If there was a change in a term or condition of employment, the change was not a "material, substantial, and significant" change.

A change only violates the Act if it "materially, substantially and significantly" changes a term or condition of employment. *MV Transp., supra,* 368 NLRB, at *2; *Mondelēz Global, supra*, 369 NLRB at 817. At best, the Company changed how the 4.8% contribution was calculated; it did not change the 4.8% match that had always been provided. Tr. 59. To establish a violation of the Act, Charging Party and General Counsel must establish not only that there was a change—which they failed to do—but that the alleged change was *significant*. *See Mondelēz Global, supra*. No evidence was presented to establish how, if at all, any bargaining

unit member was impacted. The "change" from a 4.8 match to a 4.8 match was not a significant change.

4. If there was a change in a term or condition of employment, Charging Party waived its right to bargain over the change.

If the Board believes a change did occur—a change in the rate of accrual without a change in the total accrual—this "change" did not violate the Act. In *MV Transportation*, the Board rejected the concept of a "clear and unmistakable waiver" when assessing alleged unilateral changes and adopted a "contract coverage" rationale. 368 NLRB No. 66, at *1 (2019). "An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *Id.* at *3.

CWA waived its right to negotiate over any changes by agreeing to a mere recitation of the existence of the 401(k), without any parameters on a guaranteed match or restrictions on the employer's ability to make changes to the 401(k) plan. R. Ex. 2; Tr. 140. "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." *Id.* at 8, quoting *NLRB v. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (emphasis in original).

It is undisputed that the CWA attempted and failed to have the Company guarantee a specific match to the 401(k). The CWA accepted the Company's offer to simply acknowledge the existence of the 401(k). Tr. 168-169, 171. Under the "contract coverage" rationale adopted by the Board in *MV Transportation, supra*, "the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within

the compass or scope of contractual language granting the employer the right to act unilaterally." 368 NLRB at 2. Where, as here, a contract (the signed MOA, R. Ex. 2) only provides that the employer will provide a 401(k), there is nothing in the agreement, or the bargaining history, that would limit the employer's ability to change the 401(k) provided. Based upon the plain language of the MOA (R. Ex. 2), the CWA relinquished its right to bargain over the specifics of the 401(k).

5. There was no violation of Section 8(d).

Charging Party and General Counsel's premise of a Section 8(d) violation falls apart when viewed in light of the reality that the challenged provision in the CBA did not reflect the terms and conditions negotiated between the Parties. "Therefore, I cannot find that there was any meeting of the minds regarding the amount of Respondent's match of its employees' 401(k) program contributions. Instead, I find that the parties only agreed to memorialize the existence of Respondent's 401(k) program in the MOA." ALJD 14.15-18.

Sections 8(a)(5) and 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. *See id.* at 747; *Northwest Graphics, Inc*., 342 NLRB 1288 (2004).

Section 8(d) specifies that during the term of a contract, the duty to bargain collectively "shall also mean that no party to such contract shall terminate or modify such contract . . . ." An 8(d) allegation is "a failure to adhere to the contract." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *aff'd sub nom., Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir.

2007). When there is a conflict between a signed agreement and documents executed thereafter, the agreement reached during bargaining controls. *NLRB v. E-Systems, Inc., supra,* ALJD 14.33-37.

In Section 8(d) contract-modification cases, the Board applies a "sound arguable basis" approach to determine whether the employer's action is supported by, or is an unlawful modification of, the contract. *See id*. at 502-03. Once the Charging Party identifies a specific term contained in the contract that the employer has allegedly modified (in this case, the 401(k) provision), the employer—to avoid a violation—must demonstrate the contested action was taken based on an interpretation of that provision, for which it had a "sound arguable basis" and further that it was not "motivated by union animus or . . . acting in bad faith . . . . " *Purple Commc'n*, JD(SF)-20-18 (ALJ Dec. 2018) (citing *Bath Iron Works,* 345 NLRB at 502 (internal citations omitted)); *Milwaukee Spring Div*., 268 NLRB 601 (1984). In this case, the Company did not modify what it believed to be the agreement reached during negotiations. The Company is not required to prove that its interpretation is correct or more correct than the union's; it must merely show that its interpretation is "colorable." *Purple Commc'n, supra* (citing *Bath Iron Works,* 345 NLRB at 503).

Both Flagler and Elizabeth Dickson[13] testified, without rebut, that YP's and DexYP's conduct was based on their interpretation of the results of the negotiated tentative agreement (R. Ex. 2), consistent with the *NLRB v. E-Systems* decision. The Company paid only a 4.8% match for more than two years. Both Flagler and Dickson believed the tentative agreement (R. Ex. 2), set forth the agreed upon terms and conditions of the represented employees. Tr. 40, 73 and 75. Therefore, the Company's decision to maintain a 4.8% 401(k) match was based upon a "sound arguable basis".

[13] Dickson is the Vice President of Labor Relations for the Company. Tr. 55.

Although the Company's position is that its interpretation of the agreement reached during negotiations is the correct interpretation, that is not the issue assessed in a Section 8(d) charge. The issue is whether the Company's interpretation was colorable which, by all accounts, the Company's interpretation of the terms and conditions was consistent with the agreement reached during the bargaining process. The first element of the Section 8(d) defense has been established.

With regard to the second element (motivated by union animus), there was no evidence that the Company's process during negotiations or thereafter was conducted with union animus or in bad faith. To the contrary, by all accounts, the Company bargained in good faith. Tr. 163:164: 22.

V. CONCLUSION

As revealed and argued above, the ALJ appropriately assessed all of the evidence and properly applied the law when she determined the Charge should be dismissed. Accordingly, Respondent respectfully requests the Board affirm the decision of the ALJ.

Respectfully submitted this 15th day of September, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2020, I filed a copy of the foregoing electronically through the Agency's website and served a copy by email upon the following parties:

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